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No. 84-249

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROGER L. SPENCER, *et ux*,
Petitioners,

v.

SOUTH CAROLINA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

FRANCIS S. BLAKE
SWIDLER, BERLIN & STRELOW, CHARTERED
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-1440
Of Counsel

JOYCE HOLMES BENJAMIN
State and Local Legal Center
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

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INTEREST OF THE AMICI CURIAE

The *amici* are organizations that represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of such governments. This case presents legal issues of great importance concerning the authority of these governments with respect to their local systems of taxation.

The power to tax is central to the states' positions as separate sovereigns. To function as separate sovereigns, the states require a measure of independence and control

over the remedies available to litigants who challenge a system of state taxation as unconstitutional. Petitioners in this case, however, assert that a state court must entertain a challenge under 42 U.S.C. § 1983 to a state tax provision, even though petitioners' constitutional challenges to the provision were heard and remedied under state law. Petitioners argue that 42 U.S.C. §§ 1983 and 1988 establish a federal right to the remedy of attorneys' fees. Petitioners' argument, if adopted by this Court, would have serious and potentially far-reaching effects on state and local governments, both in terms of funding challenges to state tax systems through the provision of attorneys' fees and also in terms of the future imposition of remedies under § 1983 with respect to such challenges. *Amici* contend that Congress has not evidenced any intent to impose a federal remedial scheme for challenges to the state tax system through §§ 1983 and 1988 and that the decision of the South Carolina Supreme Court should be upheld.

STATEMENT OF THE CASE

Petitioners, residents of North Carolina, challenged a South Carolina tax provision precluding out-of-state residents from claiming certain deductions against income which were permitted to in-state residents. Their suit was filed in a South Carolina trial court under both South Carolina's tax refund statute, S.C. Code Ann. § 12-47-220, and under 42 U.S.C. § 1983. The South Carolina trial court and, subsequently, the South Carolina Supreme Court held that the state tax provision violated the privileges and immunities clause of the United States Constitution, Article IV, § 2, clause 1, and awarded petitioners the remedy provided under state law of a tax refund. South Carolina declined to exercise jurisdiction under 42 U.S.C. § 1983, however, since the court concluded that it had already provided petitioners their state law remedy for the constitutional challenge raised under § 1983. The only element added by petitioners' claim under § 1983 was a claim for attorneys' fees under 42 U.S.C. § 1988. The South Carolina Supreme Court concluded that petitioners could not avoid, through the mechanism of pleading a § 1983 cause of action, the state restrictions on the availability of attorneys' fees in challenges to the state tax system.

SUMMARY OF ARGUMENT

This Court has previously recognized that 42 U.S.C. §§ 1983 and 1988 may be supplanted by alternative remedial provisions established by Congress. *See Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 104 S. Ct. 3457 (1984). The Tax Injunction Act, 28 U.S.C. § 1341, constitutes such an alternative remedial scheme. The Act evidences a federal policy of deferring to state remedies in matters relating to a state's administration of its own tax system. The State of South Carolina, consistent with the Tax Injunction Act, provided a "plain, speedy and efficient remedy" to petitioners in this case, addressing and resolving all federal constitutional issues presented. Having provided an adequate remedy under both state and federal law, the state court's decision to decline consideration of petitioners' §§ 1983 and 1988 claims was appropriate and consistent with federal policy.

ARGUMENT

The Supreme Court has left open the issue of whether a state court must entertain an action brought under § 1983, 42 U.S.C. § 1983. *Martinez v. State of California*, 444 U.S. 277, 284 n. 7 (1980). But the issue before the Court in this case is not whether a state court is free under all circumstances to decline entertaining a § 1983 action, but rather, whether a state court has such authority in the context of a challenge to its state's tax system. The resolution of this latter issue can be found in an analysis of congressional intent. There is no immutable right to have a court, whether state or federal, adjudicate a § 1983 claim. Section 1983 "is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended." *Smith v. Robinson*, 104 S.Ct. 3457, 3469-70 (1984).

Here, analysis of congressional intent reveals two salient facts: On the one hand, there is little evidence in either the language or legislative history of §§ 1983 and 1988 to indicate a congressional intent to require states to entertain such actions, and no evidence of such an intent with respect to challenges to state tax provisions. On the other hand, there is compelling evidence that Congress acknowledged and affirmed the imperative need of a state to administer its own tax system and intended for litigants to rely on their state remedies, provided that those remedies are "plain, speedy and efficient." 28 U.S.C. § 1341 (the "Tax Injunction Act").

A. Sections 1983 and 1988 Do Not Evidence a Congressional Intent To Require States To Entertain a § 1983 Claim Relating to Its System of Taxation

Section 1983 itself does not contain any explicit congressional directive requiring state courts to entertain all Section 1983 actions. *Cf. Testa v. Katt*, 330 U.S. 386 (1947) (where Congress specifically provided that a treble

damage action could be brought in any court of "competent jurisdiction," and the Supreme Court held that state courts were not free to decline to entertain such actions). The lack of such an explicit directive is consistent with the historical background of the Civil Rights Acts. The primary intent of § 1983 was to "afford a *federal right in federal courts.*" *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added). The dominant concern of the Reconstruction Congress was the state courts' failure to administer justice even-handedly, and § 1983 and its companion jurisdictional provisions were intended to redress that problem by providing a federal forum. *Id.* As the Court has noted, "[a] pervasive sense of nationalism led to enactment of the Civil Rights Act of 1871," and with the enactment four years later of the Judiciary Act of 1875, "the lower federal courts 'ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel v. Thompson*, 415 U.S. 452, 465 (1974) (emphasis in original) (citation omitted). While this does not mean that jurisdiction over § 1983 claims was intended to rest exclusively in the federal courts, *see, e.g., Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982), it does mean that no all-encompassing federal directive to the states can be read into the section.[1]

As with § 1983, the language of § 1988 contains no explicit requirement mandating state courts to consider an award of attorneys' fees in all circumstances. The legislative history of the section, once again, indicates

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[1] It should be noted that the Supreme Court decisions preceding the enactment of § 1983 held that state courts entertained federal actions solely as a discretionary "matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution." *Kentucky v. Dennison*, 24 How. 66, 109 (1861).

that Congress was focusing on the award of attorneys' fees in *federal courts*. The Senate Report accompanying the legislation stated that the purpose of the bill was to "give *the federal courts* discretion to award attorneys' fees to prevailing parties in suit brought to enforce the civil rights acts which Congress has passed since 1866." S. Rep. No. 1011, 94th Cong., 2d Sess., 1 (1976), *reprinted in* 1976 U.S. Code. Cong. & Adm. News 5908, 5910 (emphasis added). The Report goes on to state that "[t]*his bill creates no startling new remedy*—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees . . ." *Id.* at p. 6 (emphasis added). Although attorneys' fees are available in state court pursuant to § 1988, when the state court has entertained a § 1983 action, *see Maine v. Thiboutout*, 448 U.S. 1, 10-12 (1980), Congress clearly disclaimed any intent to establish a "startling new remedy." A requirement that states provide for attorneys' fees as part of the administration of their tax systems would impose the very type of startling new remedy that Congress explicity disavowed.

That Congress did not intend to impose such a remedy for state tax systems is evidenced by its treatment of the *federal* tax system. Congress acted with great circumspection in providing for attorneys' fees in connection with litigation with the Internal Revenue Service (IRS). In 1976, when the attorneys' fee provision was added to § 1988, Congress provided that attorneys' fees would be available for litigation involving the IRS in only a narrow subset of cases, specifically not including tax refund suits (which are a typical avenue for taxpayer redress in the federal system, analogous to petitioners' refund suit in this case). *See* P.L. No. 94-559, 90 Stat. 2461; *Key Buick Co. v. C.I.R.*, 613 F. 2d 1306 (5th Cir. 1980); *Aparacor, Inc. v. United States*, 571 F.2d 552 (Ct. Claims 1978); *Kipperman v. C.I.R.*, 622 F.2d 431 F.2d (9th Cir. 1980). Congress subsequently removed the attorneys' fee provision relating to the IRS from § 1988 and modified it substantially. The current provision, contained in 26 U.S.C. § 7430, limits the amount recoverable and requires, as a condition for eligibility for the fee, that the litigant establish that the IRS's position was "unreasonable"; furthermore, the provision was made subject to a "sunset" clause, which provides for its expiration in 1985.

Congress's care in limiting the availability of attorneys' fees in litigation with the IRS suggests that, had Congress intended to require such a remedy in civil rights litigation against state revenue laws, there would have been *some* record of its consideration and determination. As Congress clearly recognized with respect to the federal tax system and the IRS, the provision of attorneys' fees may have a disruptive effect on the tax system and may also present a significant fiscal burden. An intent to disrupt the state tax system is not evident in any of the Congressional deliberations on § 1988 and should not lightly be implied.

Standing alone, it is doubtful that Congress's enactment of these general civil rights provisions would supply sufficient indicia of congressional intent to impose federal requirements on the remedies established by the states for taxpayer claims. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." 'Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). In the absence of clear congressional intent to the contrary, this "general rule" applies, and, as Professor Hart noted, its application necessarily entails "differences in remedy and procedure" among federal and state courts. *Id.* As long as the state court does not discriminate against the federal interest, the application of differential remedial provisions is an appropriate reflection of the sovereignty of both the federal and state

systems. *Compare McKnett v. St. Louis and San Francisco Ry. Co.*, 292 U.S. 230 (1934) *with Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1920).

In this case, there was no discrimination against the federal interest. South Carolina law uniformly precludes an award of attorney fees in state tax litigation. S.C. Code Ann. § 12-47-270. Furthermore, it cannot be said that the state's failure to award attorneys' fees strikes at the core of the federal right involved. Although Congress certainly stated that the provision for an award of fees was an aspect of the remedial scheme for the vindication of civil rights, *see* S. Rep. No. 1011, *supra*, at 6, it did not establish attorneys' fees as a matter of right, but rather provided for it as a discretionary remedy. 42 U.S.C. § 1988. South Carolina's refusal to implement such a discretionary federal remedy cannot reasonably be viewed as a threat to the Supremacy Clause.[2]

Petitioners place great reliance on the Court's decision in *Testa v. Katt, supra.* It is true that *Testa* "reveals that the Federal government has some power to enlist a branch of state government—there the judiciary—to further federal ends." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 (1982). But the circumstances presented in *Testa* were markedly different from those here. In *Testa*, the Court was faced with a federal statute that applied to non-governmental activity —private business activities subject to federal regulation under the Emergency Price Control Act. *Testa v. Katt, supra*, 330 U.S. at 387. This Court has consistently recognized the preeminent role given to federal enactments regulating nongovernmental activity. *See Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-41 (1816); *Federal Energy Regulatory Comm'n v. Mississippi. supra*, 456 U.S. at 766-67. In this case, however, the claimed power

[2] U.S. Constitution, Article VI, § 2.

of the federal government to "enlist a branch of state government to further federal ends" relates directly to a critical state function—the state tax system. The general notion of the implicit dominance of federal law, appropriately relied on in *Testa*, cannot be blindly transferred to an area of such vital state concern.

As this Court's decision in *Federal Energy Regulatory Comm'n v. Mississippi* illustrates, careful scrutiny must be given to any federal statute that purports to force an arm of the state to implement federal policy in an area of traditional state concern (in that case, public utility regulation). The Court upheld the federal law at issue in *Mississippi* against a challenge that it violated the Tenth Amendment, U.S. Const., Amend X, but it did so only after emphasizing that the states were free to avoid the federal intrusion by declining to regulate public utilities, 456 U.S. at 769, and that the federal government had taken steps to reduce the financial burden on the states that would be caused by their implementation of federal policy. *Id.* at 751-51 n.14; 770 n.33. Neither ameliorating aspect is present here. It cannot be realistically contended that the states may abandon their tax systems and still function as states; nor has the federal government made any effort to reduce the financial burden associated with attorneys' fees. But the critical distinction between *Mississippi* and this case is that in *Mississippi* there was a very specific statute at issue that left no doubt concerning Congress's intention. That is not the case for §§ 1983 and 1988. There is no evidence of any Congressional intent to disrupt state remedies with respect to state tax systems.

Thus, even if §§ 1983 and 1988 were considered in isolation, there would be no basis for requiring the state to entertain a § 1983 action in the circumstances presented. The federal interest in such a requirement is minimal, as evidenced by the discretionary nature of the remedy and the total lack of explicit federal attention

on the subject matter, while the corresponding state interest is high.

But §§ 1983 and 1988 need not be considered in isolation, for Congress has, through the Tax Injunction Act, provided more precise evidence of congressional intent and that evidence unmistakably supports South Carolina's action in declining jurisdiction under § 1983.

B. The Tax Injunction Act Evidences Congress's Intent To Allow State Remedial Provisions To Supplant § 1983 in Actions Relating to State Taxes

The Supreme Court, in its recent decisions, has underscored the importance that specific remedial provisions play in determining the reach of § 1983 and has consistently rejected the attempts of litigants to circumvent specific statutes through the mechanism of pleading a Section 1983 cause of action. In *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court held that the remedial limitations of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act could not be "'bypassed by bringing suit directly under § 1983.'" *Id.* at 20 (citation omitted). The Court concluded that the specific provisions in those Acts were intended by Congress "to supplant any remedy that otherwise would be available under § 1983." *Id.* at 21. Just last term, the Court held, following the reasoning of the *Sea Clammers* decision, that the specific remedial provisions of the Education of the Handicapped Act supplanted the general remedial provisions of § 1983. *Smith v. Robinson*, 104 S. Ct. 3457 (1984). The Court noted, in particular, that the Education of the Handicapped Act sought "to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child," *id.* at 3469, and that allowing a supplementary § 1983 remedy would be inconsistent with that intent. Directly at issue in *Smith v. Robinson* was whether the litigant was entitled

to attorneys' fees under § 1988, despite the fact that the Education of the Handicapped Act did not provide for attorneys' fees. The Court held that the omission of attorney's fees from the Act could not be avoided by resorting to §§ 1983 and 1988.

The principles enunciated in *Sea Clammers* and *Smith v. Robinson* apply with equal force in this case. The Tax Injunction Act evidences a congressional intent to establish an alternative remedial structure for litigants in state tax cases. The Act "has its roots in equity practice, in principles of federalism, *and in recognition of the imperative need of a state to administer its own fiscal operations.*" *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (emphasis added). In specific terms, the Act provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

Petitioners dismiss the Tax Injunction Act as merely jurisdictional, arguing that "Section 1341 and comity do no provide state courts an exemption from federal causes of action. They limit only the power of federal courts." Petitioners' Brief at 67. But that argument misses the point. By the same logic, the Reconstruction Civil Rights Acts were "jurisdictional" statutes since Congress's primary purpose was to provide a federal forum for the resolution of federal constitutional rights. The critical issue is not one of statutory labels, but one of congressional intent. The issue before the Court is what mechanism Congress intended for the vindication of federal constitutional rights in challenges to state tax systems. Petitioners claim that those rights must be vindicated in accordance with the provisions of §§ 1983 and 1988. The Tax Injunction Act stands for the proposition that those rights may be vindicated by state remedies, provided that the remedies are "plain, speedy and efficient." In the clash between these two policies, the poli-

cies underlying the Act must prevail, since the Tax Injunction Act is a more specific indication of congressional intent.

It is clear that, whether or not South Carolina exercises jurisdiction under § 1983, it must address and remedy petitioners' valid federal constitutional claims. *California v. Grace Brethren Church*, 457 U.S. 393, 414 (1982); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981). The State is thus not seeking an "exemption" from federal law, as petitioners claim. Rather, the State is asserting the right to fashion its own remedies, within the contours of the Tax Injunction Act, for the federal constitutional violation it found. The right of a state to fashion its own remedy with respect to federal constitutional challenges to its system of taxation lies at the core of the Tax Injunction Act.

One of the central concerns that led to passage of the Act was the difference in *remedies* available under federal and state law, in particular, injunctive remedies. As the Senate Report accompanying the legislation stated:

> "It is common practice for statutes of the various states to forbid actions in state courts to enjoin the collection of state and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of state legislation makes it possible for the states and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the state being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation."

S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 1-2 (1937).

The jurisdictional limitation of the Act thus had its genesis in Congress's concern that federally-imposed remedies would "disrupt state and county finances." 81 Cong. Rec. 1916 (1937) (Remarks of Sen. Bone). Congress's resolution of the problem was to place "the burden on the taxpayer to follow the required state procedure. . . ." *Alger v. Peck*, 347 U.S. 984, 985 (1954). The Tax Injunction Act "creates alternative rather than supplemental remedies. . . . Congress intended to remit a plaintiff completely to his state court remedies so long as they are plain, speedy and efficient." *Redd v. Lambert*, 674 F.2d 1032, 1036 (5th Cir. 1982).

This Court has recognized the broad significance of the policies underlying the Tax Injunction Act and has given effect to those policies in circumstances outside of the literal jurisdictional preclusion contained in the statute. Drawing on the importance of the principles of federalism embodied in the Act, the Court has held that federal courts may not grant declaratory relief against the constitutionality of state taxing statutes. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *California v. Grace Brethern Church*, 457 U.S. 393 (1982). The Court has also held that a fededal court may not entertain a § 1983 action for damages in a case involving the constitutionality of a state's tax system. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). The Court in *McNary* noted that "the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pope*. . . . Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." *Id.* at 114.

Although the Court in *McNary* and *Grace Brethren Church* was confronted with issues relating to the role of federal courts, a requirement that states entertain § 1983 actions in state tax cases would threaten exactly the

same type of harm that Congress sought to avoid through the Tax Injunction Act. For instance, as was noted in *McNary*, the nonexhaustion principle that this Court has adhered to in § 1983 actions would disrupt state tax administration. A plaintiff could argue that the same principle of nonexhaustion applies to § 1983 actions brought in state court. Similarly, one of the fundamental purposes of the Tax Injunction Act was to preserve state remedial provisions that limit the availability of injunctions in state tax cases. Yet a plaintiff, by asserting a federal right to injunctive relief under § 1983 in state court, could subvert that purpose.

The principles underlying the Tax Injunction Act thus extend beyond jurisdictional issues. Through that Act, Congress chose to place reliance on the alternative remedial schemes available in the states with respect to state tax issues, with the proviso that the states' remedy must be "plain, speedy and efficient." This approach, indicative of Congress's respect for state sovereignty in an area vital to the state's existence, is entitled to as much weight as the detailed federal remedial schemes at issue in *Sea Clammers* and *Smith v. Robinson, supra.* At a minimum, some specific indication of Congressional intent should be required before the remedial structure implicit in the Tax Injunction Act is abandoned.[3] As discussed previously, however, there is no such evidence of Congressional intent in either the language or legislative history of §§ 1983 and 1988.

It bears re-emphasizing that the state's "plain, speedy and efficient remedy" must provide for a full hearing and judicial determination *of all federal constitutional objections* to the state tax in order to meet the requirements of the Supremacy Clause as well as the standard

[3] *Amici's* argument in this case is based on the absence of any showing of a racially discriminatory animus underlying the state tax provision at issue. A stronger federal interest may be present where a racially discriminatory animus is found.

established by Congress in the Tax Injunction Act. The State of South Carolina met that requirement in this case. The state court reviewed petitioners' constitutional objections to the state tax; ruled in petitioners' favor on the constitutional issues; granted the petitioners a tax refund; and rendered the state statute null and void. There is thus no doubt that the essential federal right involved in this case has been vindicated through the remedies provided by state.

Petitioners argue, however, that their federal *statutory* rights have not been vindicated. But that argument evades the central issue in the case. The federal statutory right asserted is one that provides a cause of action for raising the very same federal constitutional rights that South Carolina addressed and resolved in petitioners' favor. Petitioners' complaint is that the State failed to consider an award of attorneys' fees under § 1988. But that complaint simply brings the issue back full circle—has the federal government demanded a particular federal remedy, award of attorneys' fees, for vindication of federal constitutional challenges to state tax systems? The answer is no. The clearest indication of Congressional intent with respect to remedies for the vindication of federal constitutional challenges to state tax systems is that contained in the Tax Injunction Act, which specifies that state remedies meeting the "plain, speedy and efficient" standard are sufficient.

In this case, the court's failure to consider awarding attorneys' fees, did not vitiate the adequacy or efficiency of the state's remedy. *Cf. Rosewell v. LaSalle Natl. Bank, supra* (sustaining a state remedy as "plain, speedy, and efficient" under the Tax Injunction Act despite the state's failure to provide for interest in tax refund litigation). Indeed, in view of the longstanding "American rule" on attorneys' fees—which does not contemplate the award of attorneys' fees as a general matter, *see Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)—

the meaning of a "plain, speedy and efficient remedy" would have to be wrenched entirely out of context to support a claim that the lack of attorneys' fees is objectionable. There is simply nothing to suggest that in enacting the attorneys' fee provision of § 1988 Congress intended, *sub silentio*, to modify the substantive content of this long-established standard. Yet, to hold that state courts must entertain § 1983 actions challenging state taxes would work this very effect.

A mandatory requirement for considering the provision of attorneys' fees is also difficult to square with the historical background of the Tax Injunction Act. One of the motivations behind the Tax Injunction Act was to prevent large out-of-state corporations from disrupting state finances through litigation. *See* S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 1-2. It is unlikely, therefore, that Congress would have imposed the liability for the attorneys' fees of such corporate tax litigants upon the state without addressing the issue in any fashion.

In short, the issue before the Court in this case is not the Supremacy Clause, but two competing federal policies: The general remedial policy enacted by Congress in § 1983 and in particular, the general, discretionary remedy provided by § 1988; and the specific policy adopted by Congress in Tax Injunction Act, which was designed to respect state sovereignty in the fashioning of remedies in state tax cases. The Court has previously addressed a comparable conflict between § 1983 and the policies underlying the Tax Injunction Act and concluded that the latter must prevail. *Fair Assessment in Real Estate Ass'n v. McNary, supra.*

Petitioners point to the *McNary* decision as underscoring the importance of requiring states to entertain § 1983 actions in state tax cases, since that decision removed their option of litigating in federal court. Petitioners' Brief at 46-50. In fact, *McNary* underscores the

inappropriateness of requiring states to entertain § 1983 in state tax cases. The primary purpose of § 1983 was to provide a federal forum for the vindication of federal rights. The question that *McNary* highlights is why Congress would have intended to *require* state courts to exercise jurisdiction over § 1983 claims that no federal court itself could entertain. If the federal interests in state remedies for constitutional challenges to state tax systems were significant, logic and the historical background of § 1983 would suggest that a federal forum would be available to litigants, since making a federal forum available is less intrusive on state sovereignty than mandating state courts to bear the entire burden of implementing federal policy. *See* Hart, *The Relations Between State and Federal Law, supra,* 54 Colum. L. Rev. at 508. However, as the *McNary* decision illustrates and the Tax Injunction Act confirms, the federal interest in prescribing a remedial structure for state taxation systems is minimal and is entirely consistent with allowing the state to fashion its own efficient and adequate remedies for resolving infirmities in its tax system.

CONCLUSION

The extent to which the federal government may, within the bounds of the Constitution, superimpose federal remedies on a state tax system is uncertain. What is certain is that Congress and the federal courts have been extremely circumspect in that area, proving again "the great fact of political science that ultimate questions often do not have to be faced in successful collaborative living." Hart, *The Relations Between State and Federal Law, supra,* 54 Column. L. Rev. at 507-08. In this case, it is clear that the discretionary federal remedy of attorneys' fees, contained in a general remedial statute, adopted without specific reference to the administration of state taxes, cannot outweigh the direct evidence of

Congressional intent contained in the Tax Injunction Act and the central principles of federalism "which should at all times actuate the federal courts." *Matthews v. Rodgers*, 284 U.S. 521, 526-27 (1932).

The decision of the South Carolina Supreme Court should be upheld.

Respectfully submitted,

FRANCIS S. BLAKE
SWIDLER, BERLIN & STRELOW, CHARTERED
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-1440
Of Counsel

JOYCE HOLMES BENJAMIN
State and Local Legal Center
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

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